



M^{R.} S^{T.} JOHN'S Argument.

My Lords,



HE Knights, Citizens, and Burgesſes of the Commons Houſe of Parliament have paſſed a Bill for the attainting of *Thomas Earle of Strafford* of High-Treaſon. The Bill hath beene transmitted from them to your Lordſhips. It concernes not him alone, but your Lordſhips and the Commons too, though in different Reſpects.

It is to make him as miſerable a man, as man or Law can make him.

Not loſſe of life alone, but with that, of honour, name, poſterity, and eſtate; Of all that's deare to all.

To uſe his owne expreſſion, an eradication of him both root and branch, as an *Achan*, a troubler of the State, as an execrable, as an accuſed thing.

This Bill, as it concernes his Lordſhip, the higheſt that can be in the penall part, ſo doth it on the other ſide as highly concerne your Lordſhips and the Commons in that which ought to be the tendreſt, the Judicatory within, that that judge not them who judge him: And in that which is moſt ſacred amongſt men, the publick Juſtice of the Kingdome.

The Kingdome is to be accounted unto for the loſſe of the meaneſt member, much more for one ſo neare the head.

The Commons are concerned in their Account for what is done, your Lordſhips in that which is to be done.

The buſineſſe therefore of the preſent Conference, is to acquaint your Lordſhips with thoſe things that ſatisfied the Commons in paſſing of this Bill, ſuch of them as have come

within my capacity, and that I can remember, I am commanded from the Commons at this time to present unto your Lordships.

My Lords, in Judgements of greatest moment, there are but two wayes for satisfying those that are to give them, Either the *Lex lata*, the Law already established, Or else the use of the same power for making new Lawes, whereby the old at first received life.

In the first consideration, of the settled Lawes; In the degrees of punishment the positive Law received by generall consent, and for the common good, is sufficient to satisfy the conscience of the Judge in giving judgement according to them.

In severall Countreys there is not the same measure of punishment for one and the same offence. Wilfull murder in *Ireland* is Treason, and so is the wilfull burning of a house or stack of Corne. In the Isle of *Man*, it's felony to steale a Hen, but not to steale a Horse; and yet the Judge in *Ireland* hath as just a ground to give judgement of high Treason in those Cases there, as here to give judgement only of felony, and in the Isle of *Man* of felony for the Hen, as here of petty Larceny.

My Lords, in the other consideration of using the Supream power, the same Law gives power to the Parliament to make new Lawes, that enables the inferiour Court to judge according to the old: The rule that guides the conscience of the Inferiour Court is from without, the prescripts of the Parliament and of the Common Law; in the other the rule is from within; That *salus populi* be concerned; That there be no wilfull oppression of any the fellow members, that no more blood be taken than what is necessary for the Cure, the Laws and Customes of the Realme as well enable the exercise of this, as of the ordinary and judicall power.

My Lords, what hath beene said, is because that this proceeding of the Commons by way of Bill, implyes the use of the meere *Legislative* power, in respect new Lawes are for the most part past by Bill.

This, my Lords, though just and Legall, and therefore not wholly excluded, yet it was not the only ground that put the Commons

Commons upon the Bill, they did not intend to make a new Treason, and to condemne my Lord of *Strafford* for it, they had in it other Considerations likewise, which were to this effect.

1 First, the Commons knew that in all former ages, if doubts of Law arose upon cases of great and generall Concernment, the Parliament was usually consulted withall for resolution; which is the reason that many Acts of Parliament are only declarative of the Old Law, not introductive of a new, as the great Charter of our Liberties; the Statute of the five and twentieth yeere of *Edward* the third, of Treasons; the Statute of the Prerogative, and of late the petition of Right. If the Law were doubtfull in this Case, they conceived the Parliament (where the old may bee altered, and new Lawes made) the fittest Judge to cleare this doubt.

2 Secondly, my Lords, they proceeded this way to out those scruples and delays, which through dis-use of proceedings of this nature might have risen in the manner and way of proceeding, since the Statute of the first of *Henry* the fourth, the seventeenth chapter, and more fully in the Roll, number. 144. The proceedings in Parliament have usually beene upon an Inditement first found, though in Cases of Treason particularly mentioned in the Statute of the five and twentieth yeere of *Edward* the third, which had not beene done in this Case: Doubts likewise might rise for Treasons, not particularly mentioned in the Statute of 25. *Edw.* 3. whether the declaratory power of Parliament be taken away, and if not taken away, in what manner they were to be made, and by whom. They finde not any Attainders of Treason in Parliament for neere this 200 yeeres, but by this way of Bill. And againe, they knew that whatsoever could be done any other way, it might be done by this.

3 Thirdly, in respect of the proofes and depositions that have beene made against him; for first, although they knew not but that the whole Evidence which hath beene given at the Barre, in every part of it is sufficiently comprehended within the Charge, yet if therein they should be mistaken, if it should prove otherwise, use may justly be made of such Evidence in this way of Bill, wherein so as Evidence be given in, it's no

way requisite that there should have been any Articles or Charge at all. And so in the Case of double Testimony upon the Statute of the first of *Edward* the sixth, whether one direct witnesse with others to Circumstances, had been single or double Testimony; and although single Testimony might be sufficient to satisfie private Consciences, yet how farre it would have been satisfactory in a judicall way where forms of Law are more to be stood upon, was not so cleare; whereas in this way of Bill private satisfaction to each mans Conscience is sufficient, although no evidence had been given in at al.

My Lords, the proceeding by way of Bill, it was not to decline your Lordships Justice in the judicall way; In these Exegencies of the State and Kingdome, it was to husband time by silencing those doubts: they conceived it the speediest and the surest way.

My Lords, These are in effect, the things the Commons took into their Consideration, in respect of the manner, and way of proceeding against the Earle. In the next place I am to declare unto your Lordships, the things they took into their Consideration, in respect of the matter and merits of the Cause; They are comprehended within these six heads.

1. That there is a treason within the Statute of 25.E.3. by Levying of warre upon the matter of the fifteenth Article.

2. If not by actuall levying of war, yet by advising and declaring his intencion of war, and that by *Savils* warrant, and the advice of bringing over the Irish army, upon the matter in the 23 Article; The intending of a Warre, if not within the Clause of Levying Warre in the statute of 25.E.3. yet within the first treason of compassing the death of the King.

3. If neither of these two single Acts be within the Statute of 25.E.3. yet upon putting all together, which hath been proved against him, That ther's a Treason within the first clause of compassing the death of the King.

Et si non prosunt singula, juncta juvant.

4. That he hath sessed and laid Souldiers upon the Subjects of *Ireland* against their will, and at their Charge, within the *Irish* Statute of the eighteenth yeare of *Henry* the sixth. That both person and thing are within the Statute, That the statute remaines in force to this day, That the Parliament here hath

Cogni-

Cognizance of it. And that even in the ordinary way of Judicature, that if there be a Treason, and a Traitor, that the want of jurisdiction in the Judicall way, may justly be supplied by Bill.

5. That his endeavouring to subvert the fundamentall Lawes and Governement of the Realmes of *England* and *Ireland*, and instead thereof, to introduce a tyrannicall Government against Law, is Treason by the Common law, That Treasons at the Common Law are not taken away by the Statutes of 25. E. 3. 1. H. 4. c. 10. 1. Mar. c. 1. nor any of them.

6. That as this Case stands, It's just and necessary to resort to the Supream power in Parliament, in case all the rest should faile.

Of these six, five of them are Treason, within the Compasse of the Lawes already established, Three within the Statute of 25. E. 3. One within the *Irish* Statute, the other by the Common Law of *England*.

If but any one of these six Considerations hold, The Commons conceive that upon the whole matter they had good cause to passe the Bill.

My Lords, for the first of levying Warre, I shall make bold to read the Case to your Lordships before I speak to it; it's thus:

The Earle did by warrant under his hand and Seale give authority to *Robert Savill* a Serjeant at Arms, and his Deputies, to fesse such number of Souldiers, horse and foot of the Army in *Ireland* together with an officer, as the Serjeant should think fit, upon his Majesties Subjects of *Ireland* against their will: This warrant was granted by the Earle to the end to compell the Subjects of *Ireland* to submit to the unlawfull Summons and orders made by the Earle upon paper Petitions exhibited unto him in case of private Interest betweene party and party; This warrant was executed by *Savill* and his Deputies by fessing of Souldiers both horse and foot, upon divers of the Subjects of *Ireland* against their will in warlike manner, and at divers times the Souldiers continued upon the parties upon whom they were fessed, and wasted their goods, until such time as they had submitted themselves unto those Summons and orders.

My

My Lords, This is a levying of warre within the statute of 25^o. E. 3. The words of the Statute are, *If any man doe levy warre against our Lord the King in his Realm*, this is declared to be Treason.

I shall indeavour in this to make it appeare to your Lordships.

1 What shall be a levying of Warre, in respect of the motive or cause of it.

2 What shall be said a levying of warre in respect of the Action or thing done.

3 And in the third place, I shall apply them to the present Case.

It will be granted in this of levying of warre, That forces may be raised and likewise used in a war-like manner, and yet no levying of warre within the Statute, that is, when the forces are raised and imployed upon private ends either of revenge or interest.

Before this Statute in E. 1. time. The Title of a Castle was in difference between the Earles of *Hereford* and *Gloster*, for the maintaining of the possession on the one side, and gayning of it on the other. Forces were raised on either side of many hundred men, they marched with Banners displayed one against the other. In the Parliament in the 20. yeere of *Edw. 1.* this adjudged onely trespassse, and either of the *Earles* fined 1000. markes a peece.

After the Statute in Hillary Terme, the fiftieth yeere of *Edward* the third, in the *Kings Bench*, Rot. 3. *Nicholas Huntercome* in a war-like manner, with 40 men armed, amongst other weapons, with Gunnes (so ancient as appeares by that Record they were) did much spoyle in the Mannour of the *Abbee* of *Dorchester*, in the County of *Oxford*: This no Treason: So it hath beene held by the Judges, that if one or more Townships upon pretence of saving their Commons, doe in a forcible and war-like manner, throw in Inclosures; This is only a Riot, no Treason.

The words of the Statute of 25. *Edw. 3.* cleare this Point, that if any man ride armed openly or secretly with men at Armes against any other to kill and robbe, or to detaine him untill he hath made fine and rancome for his deliverance; this

is declared not to be Treason, but Fellony or Trespasse, as the case shall require, all the printed Statuts which have it covertly or secretly are mis-printed; for the words in the Parliament Roll, as appears n. 17. are *Discoverment ou secretment* openly or secretly.

So that my Lords, in this of levying warre, the Act is not so much to be considered, but as in all other Treasons and Felonies, *quo animo*, with what intent and purpose.

Obj. My Lords, If the end be considerable in levying warre, it may be said, that it cannot be a Treason warre, unlesse against the King: For the words of the statute are, *If any man levy warre against the King.*

Ans. That these words extend further then to the Person of the King appears by the words of the Statute, which in the begining declares it to be Treason to compassse & imagine the Kings death, and after other Treasons, this is to be declared to be Treason to levy war against the King. If the levying of war extend no further then to the person of the King, these words of the Statute are to no purpose, for then the first Treason of compassing the Kings death had fully included it before, because that he which levies war against the person of the King doth necessarily compassse his death.

Its a warre against the King when intended for alteration of the Lawes or Government in any part of them, or to destroy any of the great Officers of the Kingdome. This is a levying of War against the King.

1 Because the King doth protect and maintaine the Laws in every part of them, and the great Officers to whose care he hath in his own steed delegated the Execution of them.

2 Because they are the Kings Lawes, He is the Fountaine from whence in their severall Channels they are derived to the Subject; all our inditements run thus, Trespasses laied to be done, *Contra pacem Domini Regis*, the Kings peace for exorbitant offences, though not intended against the Kings Person, against the King his Crowne and Dignity.

My Lords, this construction is made good by diverse Authorities of great weight ever since the statute of 25. E. 3. downwards.

In R. the 2^{ds}. time Sir Thomas Talbot conspired the death of the Dukes of Gloucester and Lancaster, & some other of the Peeres; for the effecting of it, he had caused diverse people in the County of

Chester to be armed in warre-like manner, in Assemblies. In the Parliament held the seventeenth yeere of *Richard* the second, number the 20. Sir *Thomas Talbot* accused of high Treason for this; Its there declared, that insonmuch as one of them was Lord high Steward of *England*, and the other high Constable of *England*, that this was done in destruction of the estates of the Realme, and of the Lawes of the Kingdome, and therefore adjudged Treason; and the judgement sent downe into the Kings Bench, as appears in *Easter-Tearme* in the seventh yeer of *Richard* the second in the Kings Bench, *Rott.* 16. These two Lords had appeared in the eleventh yeere of *Richard* the second in mainetenance of the Aet of Parliament made the yeere before; one of them was of the Commissioners appointed by Parliament, and one of the Appellours of those that would have overthrowne it: The Duke of *Lancaster* likewise was one of the Lords that was to have beene indicted of Treason for endeavouring the maintenance of it, and therefore conspiring of their deaths is said to be in destruction of the lawes; This there declared to be a Treson that concerned the Person of the King and the Common-wealth.

In that great insurrection of the Villains and meaner people in *Richard* the seconds time, they tooke an oath, *Quod Regi & Communibus fidelitatem servarent*, to be true to the King and Commons, that they would take nothing but what they paid for, punished all theft with death, here's no intendment against the person of the King; The intent was to abolish the Law of villainage and servitude, to burne all the Records, to kill the Judges; this in the Parliament of the fifth yeere of *Richard* the second, number the one and thirtieth and two and thirtieth, the first part, is declared to be Treason against the King and against the Law.

In the eleventh yeere of *Richard* the second, in Parliament the raising of forces against the Commissioners appointed by act of Parliament the yeere before adjudged Treason by all the Judges.

The Statute of 1. *Mar. cap.* 12. enacts that if twelve or more shall indeavo. r by force to alter any of the Lawes or Statutes of the Kingdome, hee shall from such a time there limited be adjudged onely as a felon; This act was to continue but to the next Parliament, it is expired; it shewes by the words onely that

that the offence was higher before the making of it.

My Lords, In *Queene Elizabeths* time, *Grant* and divers Prentices of *London*, to the number of 200. rose and assembled at Tower-hill, carried a Cloake upon a Pole instead of a banner, their intent was to deliver divers Prentices out of prison that had beene committed upon a sentence in Star-Chamber for ryots, To kill the Lord Major of *London*, and for setting prizes on victuals. In *Trinity Terme* 37. *Eliz.* divers of the Judges consulted withall, and resolved that this was a levying of warre against the *Queene*, being intended against the government and officers of the *Queene*, and thereupon *Grant* and others executed as Traitors.

Afterwards in that *Queenes* time, divers of the County of *Oxford* consulted together to goe from house to house in that County, and thence to *London* & other parts to excite them to take Armes for the throwing in of all inclosures throughout *England*, nothing was done, nor no Assembly: The Statute of 13. *Eliz. cap. 1.* during the *Queenes* life made it Treason to intend or advise to levy war against the *Queene*.

In *Easter Terme*, 39. *Eliz.* All the Judges of *England* met about the case, it was resolved by them, that this was a warre intended against the *Queen*, they agreed that if it had beene of one Towneship or more upon private interest and claime of right of Common, it had not bin Treason; But this was to throw in all inclosures thorough the Kingdome, wherto these parties could pretend no claime; that it was against the Law, in regard that the Statute of *Merton* gave power of Inclosures in many Cases. Upon this Resolution *Bradshaw* and *Burton* were executed at *Aynestowe hill* in *Oxford-shire*, the place where they intended their first meeting.

So that, my Lords, if the end of it be to overthrow any of the Statutes, any part of the Law and settled Government, or any of the great Officers intrusted with the execution of them; this is a warre against the King.

My Lords, it will be further considerable, what shall be accounted a levying of warre in respect of the Actions & things done; There's a designe to alrer some part of the Lawes and present Government, for the effecting thereof people be provided of Armes, gathered together into troopes, but afterwards march not with Banners displayed, nor doe *Bellum percutere*.

Whether the arming themselves and gathering together upon this Designe, whether this be a warre or such prosecution of the Designe with force as makes it Treason within the Statute?

First, If this be not a Warre in respect that it necessarily occasions hostile preparations on the other side?

2. From the words of the Statute, shall levy warre, & be thereto probably attainted of open Deed by people of their Condition, although the bare conspiring be not an open Deed, yet whether the arming and drawing men together be not an open Declaration of Warre?

In Sir *Thomas Talbots* case before cited in the seventeenth yeere of *Richard* the second, The Acts of force are expressed in the Parliament Roll: That he caused divers of the people of the County of *Chester* to be armed in a war-like manner in assemblies; heere is no marching, no banners displayed.

In the eighth yeer of *Henry* the 8th. *William Bell* and *Thomas Lacy* in *Com' Kanc.* conspired with *Thomas Cheney*, called the *Hermite* of the *Queene of Fairies*, to overthrow the Lawes and customes of the Realme, and for the effecting of it, they with two hundred more met together, and concluded upon a course of raising greater forces in the county of *Kent*, and the adjacent Shires: this adjudged Treason, these were open Actes.

My Lords, for the application of both these to the Case in question

First in respect of the end of it, here was a warre against the King, It was to subvert the Lawes, This being the designe, for the effecting of it, he assumed to his own person, an arbitrary power over the lives, liberties and estates of his Majesties Subjects, and determined Causes upon paper petitions at his own will and pleasure, obedience must be forced by the Army; this declared by the Warrant.

2 My Lords, if it be said, That the Warrant expresseth not any intent of subverting the Lawes, It expresseth fully one of the principall meanes whereby this was to be done, that is, obedience to his arbitrary orders upon paper petitions, this was done in reference to the maine designe.

In the Cases of the Towne of *Cambridge* and *Sr. William Cogau*, that have formerly been cited to your Lordships, upon other occasions, the things in themselves were not Treason, they

they were not a levying of Warre.

In that of *Cambridge*, the Town met together, and in a forcible manner broke up the University treasury, and tooke out of it the Records and Evidence of the liberties of the Vniversity over the Town.

In the other, they of *Bridgewater* marched to the Hospitall, and compelled the Maister of the Hospitall to deliver unto them certaine Evidences that concerned the Towne, and forced him to enter into a bond of two hundred pound.

These, if done upon these private ends alone, had not been Treason, as appeares by the very words of the Statute of 25. *Edw. 3.* before mentioned of marching openly or secretly.

But my Lords, these of *Cambridge* and *Bridgewater*, they were of the conspiracy with the villaines, as appeares in the Parliament Roll of the first yeare of *Richard* the second, number the one and thirtieth, and two and thirtieth, where the Towns of *Cambridge* and *Bridgewater* are expressely excepted out of the generall pardon made to the Villaines. This being done in Reference to that designe of the villaines of altering the Lawes, this was that which made it Treason.

If the designe went no further then the enforcing obedience to these paper orders made by himselfe, It was sufficient, it was to subvert one fundamentall part of the Lawes, nay in effect the whole Law: what use of Law if he might order and determine of mens estates at his own pleasure? This was against the Law notoriously declared in *Ireland*.

In the close roll in the Tower, in the five and twentieth yeere of *Ed. 1.* a Writ went to the Justices in *Ireland* (that Kingdome at that time was governed by Justices) declaring that upon petitions they were not to determine any titles betweene party and party upon any pretence of profit whatsoever to the King.

6 In the eight and twentieth yeare of *Henry* the sixth, the second Chapter, Suites in equity, not before the Deputy, but in Chancery, Suits at Common Law, not before him, but in Cases of life in the Kings Bench, for title of land or goods in the proper Courts of the Common pleas, or Kings Bench.

This declared in the Instructions for *Ireland* in the latter end of King *James* his time, and by the Proclamation in his Majesties time, my Lord took notice of them, called the Commissioners narrow-hearted Commissioners.

The Law said, he should not thus proceed in subversion of it; he saith, he will, and will enforce obedience by the Army. This is as much in respect of the end, as to endeavour the overthrow of the Statutes of Laborers, of victuals, or of *Merton* for Inclosures. Here is a warre against the King in respect of the end.

2. In respect of the Actions, whether there be either a levying of war, or an open deed, or both.

My Lords, there was an Army in *Ireland* at that time of two thousand horse and foot, by this Warrant there is a full designation of this whole Army, and an Assignment of it over unto *Savill* for this purpose. The Warrant gives him power from time to time to take as many souldiers, horse and foot, with an Officer, throughout the whole Army, as himselfe shall please, heere is the terrour and awe of the whole Army to enforce obedience. My Lords, if the Earle had armed two thousand men, horse and foot, and formed them into companies to this end, your Lordships would have conceived that this had been a war, It's as much as in the case of Sir *Thomas Talbot* who armed them in assemblies.

This is the same with a breach of trust added to it. That Army was first raised and afterwards committed to his trust for defence of the people, is now destined by him to their destruction. This assignation of the Army by his Warrant under his hand & seale is an open Act.

2. My Lords, heere's not onely an open act done but a levying of war, souldiers both horse and foot, with an Officer in warlike manner sessed upon the subject, which killed their Cattell, consumed and wasted their goods.

Ob. O, but five or six were the most employed at any time, a mighty warre of six men, scarce a Ryot.

Ans. Your Lordships observe a great difference where six single men goe upon a designe alone, and when sent from an Army of six hundred, all engaged in the same service, so many were sent as were sufficient to execute the command; if upon a poore man fewer, more upon a rich; if the six had not beene able, the whole Army must make it good; the reason that the Sheriffe alone, or but with one Bayliffe to doe execution, is, because he hath command of the Law, the Kings Writ and the *posse Comitatus* in case of Resistance; heere's the warrant of the Generall of an Army, heere's the *posse exercitus*,

exercitus, the power of the Army, under this awe of the whole Army, six may force more then sixty without it, and although never above six in one place, yet in the severall parts of the Kingdome at the sametime might be above sixty; for sselling of souldiers was frequent, it was the ordinary course for execution of his orders.

The Lord Lieutenent of a County in *England* hath a designe to alter the Lawes and government, may admit the design goes not so high, he onely declares thus much, that he will order the freeholds and the estates of the Inhabitants of the County at his owne will and pleasure, and doth accordingly proceed upon paper petitions; foreseeing there will be disobedience, he grants out warrants under his hand and seale to the deputy Lieutenants and Captaines of the traine bands, that upon refusal they shall take such number of the traine bands thorow the County with Officers, as they shall think good, and lay them upon the lands and houses of the refusers; Souldiers in a warlike manner are frequently sessed upon them accordingly. Your Lordships doe conceive that this is a levying of Warre within the Statute.

The Case in question goes further in these two respects.

1 That it is more against the declared Law in *Ireland*, not only against the Common Law, but likewise against the Statute of the eight and twentieth year of *Henry* the sixth, against the Acts of the Commissioners, against Proclamations in pursuance of the Law, against that himselfe took notice of, Narrow hearted Commissioners.

2 In this that here was an Army, the Souldiers, Souldiers by profession, Acts of hostility from them of greater Terror than from free-holders of the same County.

My Lords, I have now done with the first of levying warre.

2 The second is the machination, the advising of a warre; The case in this rests upon the warrant to *Savill*, and the advice in the 23 Article.

The Warrant shewes a resolution of employing the old Army of *Ireland*, to the oppression of his Majesties Subjects and the Lawes.

In the 23 Article, having told his Majesty that hee was loosed and absolved from rules of Government, and might doe every thing which power might admit, he proceeded further in speech

to his Majesty, in these words; You have an Army in *Ireland* you may employ to reduce this Kingdome.

My Lords, both being put together, there's a machination, a practise, an advise to levie warre, and by force to oppresse and destroy his Majesties Subjects.

Obj. It hath beene said, the Statute of 25. *Edw.* 3. is a penall Law, and cannot bee taken by equity and construction, there must be an actuall warre; the Statute makes it Treason to counterfeit the Kings Coyne, the conspiring the raising of furnaces is no Treason, unlesse he doth *nummum percutere*, actually coyne.

Answ. My Lords, this is onely said, not proved, the Law is otherwise, 19. of *Henry* the sixt, fol. 47. there adjudged that the conspiring and ayding to counterfeit coyne was Treason; and Justice *Stamford* fol. 3. & 44. is of opinion, That this, or conspiring to counterfeit the great Seale is Treason. The Statute is, If any shall counterfeit the great Seale, conspiring to doe it by the book, is Treason; if a man take the broad Seale from one Pattent, and put it to another, here is no counterfeiting, it's *tun-tamount*, and therefore Treason, as is adjudged in 2. *Henry* 4. fo. 25. and by the opinion of *Stamford*.

173 If machination or plotting a warre be not within that clause of the Statute of levying warre, yet it's within the first of compassing the death of the King, as that which necessarily tends to the destruction both of the King and of the people, upon whose safety and protection hee is to engage himselfe: That this is Treason, hath beene adjudged both after the Statutes of the first of *Henry* the fourth, chapter the tenth, and the first of *Queene Mary*, the first chapter, so much insisted upon on the other side. In the third yeare of King *Henry* the fourth, one *Balshall* comming from *London*, found one *Bernard* at plough in the parish of *Osley* in the Connty of *Heriford*; *Bernard* asked *Balshall*, what news, hee told him the newes was, That King *Richard* the second was alive in *Scotland* (which was false, for hee was then dead) and that by *Midsomer* next he would come into *England*; *Bernard* asked him, what was best to be done; *Balshall* answered, get men, and goe to King *Richard*. In *Michaelsmas Terme*, in the third yeare of *Henry* the fourth, in the Kings Bench, rot. 4. this advise of warre adjudged Treason.

In *Queene Maries* time, *Sir Nicholas Throgmorton* conspired with *Sir Thomas Wyatt* to levie warre within this Realme for alteration in Religion, he joyned, not with him in the execution. This Conspiracy alone declared to bee Treason by the Judges. This was after the Starnte of the first of *Queene Mary* so much insisted upon. That Parliament ended in *October*, this opinion was delivered the *Easter-Terme* after, and is reported by *Justice Dyer*, fo. 98. It's true, *Sir Thomas Wyatt* afterwards did levie warre, *Sir Nicholas Throgmorton* hee onely conspired, this adjudged Treason.

Storie, in *Queene Elizabeths* time, practised with Forreiners to levy warre within the Kingdome, nothing done in pursuance of the practise; The intent without any adhering to Enemies of the *Queene* or other cause, adjudged to bee Treason, and hee executed thereupon. It's truemy Lords, that yeare 13. *Elizabeth* by Act of Parliament, it's made Treason to intend the levying of warre; this case was adjudged before the Parliament. The case was adjudged in *Hillary Terme*, the Parliament began not untill the *April* following; This my Lords, is a case adjudged in point, That the practising to levy warre, though nothing be done in execution of it is Treason.

Obj. It may be objected that in these Cases, the conspiring being against the whole Kingdome included the *Queene*, and was a compassing her destruction, as well as of the Kingdomes; here the advice was to the King.

Ans. 1. The answer is, first, that the warrant was unknowne to his Majesty, that was a machination of waire against the people and Laws, wherein his Majesties person was engaged for protection.

2. That the advice was to his Majesty, aggravates the offence, it was an Attempt not only upon the Kingdome, but upon the Sacred person, and his office too; himselfe was *hostes patrie*, hee would have made the Father of it so too; nothing more unnaturall, more dangerous; To offer the King poyson to drink, telling him that it is a Cordiall, is a compassing of his death.

The poyson was repelled, there was an antidote within, the malice of the giver beyond expression. The perswading of Forreiners to invade the kingdome holds no proportion with this : Machination of warre against the Lawes or kingdome is against the King, they cannot be severed.

The third
generall
Head.

My Lords, if no actuall warre within the Statute, if the counselling of a war, if neither of these single Acts be Treason within the Statute; The Commons in the next place have taken it into their consideration, what the addition of his other words, Counsells, and Actions do operate in the case, and have conceived, That with this addition all being put together, that he is brought within the Statute of 25. *Edward* 3.

The words of the Statute are, if any man shall compassse or imagine the death of the King, the words are not, if any man shall plot or consult the death of the King, no my Lords, they go further than to such things as are intended immediately, directly, and determinatively against the life and person of the King, they are of a larger extent; to compassse is to doe by circuit, to consult or practice another thing directly, which being done, may necessarily produce this effect.

However it be in the other Treasons within this Statute, yet in this by the very words there is roome left for constructions, for necessary Inferences and Consequences.

What hath bene the judgement and practice of former times concerning these words of compassing the Kings death, will appeare to your Lordships by some cases of attainders upon these words.

One *Owen* in King *James* his time in the 13. yeere of his raigne at *Sandwich* in *Kent*, spake these words, That King *James* being excommunicated by the Pope, may bee killed by any man; which killing is no murther: being asked by those he spake to, how he durst maintaine so bloody an assertion? he answered that the matter was not so haynous as was supposed; for the King who is the lesser, is concluded by the Pope who is the greater; and as a Malefactor being condemned before a Temporall Judge, may bee delivered over to bee Executed;

so.

so the King standing convicted by the Popes sentence of excommunication, may justly be slaughtered without fault; for the killing of the King is the execution of the Popes supream sentence, as the other is the execution of the Law: for this judgement of High Treason was given against him, and execution done.

My Lords, here is no cleere intent appearing that *Owen* desired the thing should bee done, only Arguments that it might be done, This is a compassing, there is a cleere Endeavour to corrupt the judgement, to take off the bonds of conscience, the greatest security of the Kings life; God forbid saith one of better judgement than he, That I should stretch out my hand against the Lords annointed, no saith he, the Lord doth not forbid it, you may for these reasons lawfully kill the King.

Hee that denies the Title to the Crown, and plots the meanes of setting it upon another head, may doe this without any direct or immediate desiring the death of him that then weares it, yet this is Treason, as was adjudged in 10. *Henry 7.* in the case of *Burton*, and in the Duke of *Norfolks* case. 13. *Elizabeth.*

This is a compassing of his death, for there can no more be two Kings in one Kingdome, than two Suns in the Firmament; he that conceives a title, counts it worth ventring for, though it cost him his life, he that is in possession thinks it as well worth the keeping. *John Sparhanke* in King *Henry* the fourths time, meeting two men upon the way, amongst other talk said, that the King was not rightfull King, but the Earle of *March*, and that the Pope would grant indulgencies to all that would assist the Earles title, and that within halfe a yeece there would be no Liveries nor Conizances of the King, that the King had not kept promise with the people, but had layd taxes upon them. In *Easter Terme* in the third yeece of *Henry* the fourth in the Kings Bench, Rot. 12. this adjudged Treason. This denying the title with motives though but impliedly of Action against it, adjudged Treason, this is a compassing the Kings death.

How this was a compassing the Kings death, is declared in the reasons of the judgement; That the words were spoken with an intent to withdraw the affections of the people from the

King, and to excite them against the King, that in the end they might rise up against him in *mortem & destructionem* of the King.

My Lords, in this Judgement and others which I shall cite to your Lordships, It appears that it is a compassing the Kings death by words, to indeavour to draw the peoples hearts from the King, to set discord betweene the King and them, whereby the people should leave the King, should rise up against him to the death and destruction of the King.

The cases that I shall cite, prove not onely that this is Treason, but what is sufficient evidence to make this good.

Upon a Commission held the 18. yeere of *Edw. 4.* in *Kent*, before the *Marquesse of Dorset* and others, an Inditement was preferred against *John Awater* of High-Treason, in the forme before mentioned, for words which are entred in the enditement *sub hac forma*, That he had beene servant to the Earle of *Warwicke*, that though he were dead, the Earle of *Oxford* was alive, and should have the government of part of the Countrey, That *Edward* whom you call King of *England*, was a false man, and had by art and subtilty slaine the Earle of *Warwicke* and the Duke of *Clarence* his brother, without any cause, who before had beene both of them attainted of High-Treason.

My Lords, this Inditement was returned into the Kings Bench in *Trinity* Terme in the eighteenth yeere of *Edward* the fourth, and in *Easter* Terme in the two and twentieth yeere of *Edward* the fourth he was outlawed, by the stay of the outlawry, so long it seemes the Judges had well advised before whether it were Treason or not.

At the same Sesion *Thomas Hober* was indited of Treason for these words, *That the last Parliament was the most simple and insufficient Parliament that ever had beene in England. That the King was gone to live in Kent, because that for the present he had not the love of the Citizens of London, nor should he have it for the future. That if the Bishop of Bath and Wels were dead, the Archbishop of Canterbury, being Cardinall of England, would immediately lose his head.* This inditement was returned into the Kings Bench in *Trinity* Terme in the eighteenth yeere of *Edward* the fourth.

Afterwards

Afterwards there came a Privy Seale to the Judges to respite the proceedings, which as it should seeme was to the intent the Judges might advise of the Case, for afterwards he is outlawed of high-Treason upon this inditement.

These words were thought sufficient evidence to prove these severall Inditements, That they were spoken to withdraw the peoples affection from the King, to excite them against him, to cause risings against him by the people, *in mortem & destructionem* of the King.

Your Lordships are pleased to consider that in all these Cases, the Treason was for words onely, words by private persons, and in a more private manner, but once spoken and no more, onely amongst the people, to excite them against the King.

My Lords, here are words, Counsels more than words, and actions too, not onely to dis-affect the people to the King, but the King likewise towards the people; not once but often, not in private, but in places most publique, not by a private person, but by a Counsellor of State, a Lord Lieutenant, a Lord President, a Lord Deputy of Ireland.

1 To his Majesty, *That the Parliament had denied to supply him*; a slander upon all the Commons of England in their affection to the King and Kingdome, in refusing to yeeld timely supply for the necessities of King and Kingdome.

2 From thence, *That the King was loose and absolved from rules of government, and was to doe every thing that power would admit*. My Lords, more cannot be said, they cannot be aggravated, whatever I should say would be in diminution.

3 Thence, *You have an Army in Ireland you may employ to reduce this Kingdome*.

To counsell the King not to love his people, is very unnaturally, it goes higher, to hate them, to malice them in his heart; the highest expressions of malice, to destroy them by warre: These coales they were cast upon his Majesty, they were blowne, they could not kindle in that brest.

Thence, my Lords, having done the utmost to the King, hee goes to the people: At York the Country being met together for Justice, at the open Assizes upon the Bench, he tells them, speaking

of the Justices of the Peace, *that they were all for Law, nothing but Law, but they should find that the Kings little finger should be heavier than the loines of the Law.*

They shall find, my Lords; who speaks this to the people, a Privie Counsellour; this must be either to traduce his Majesty to the people as spoken from him, or from himselfe, who was Lord Lieutenant of the County and President, intrusted with the forces and Justice of those parts, that he would imploy both this way; add, my Lords, to his words there the exercising of an arbitrary and vast Jurisdiction before he had so much as Instructions or colour of warrant.

Thence we carry him into *Ireland*, there he represented by his place the sacred person of his Majesty.

1 There at *Dublyn*, the principall City of that Kingdome, whither the Subjects of that Countrey came for Justice, in an Assembly of Peeres and others of greatest ranke, upon occasion of a speech of the Recorder of that City touching their Franchises and Legall Rights, he tels them, that *Ireland was a conquered Nation, and that the King might doe with them what he pleased.*

2 Not long after, in the Parliament 10. Car. in the Chaire of State, in full Parliament, againe, That *they were a conquered Nation, and that they were to expect Lawes as from a Conquerour*; before, *The King might doe with them what he would*; now, *They were to expect it, that he would put this power of a Conquerour in execution.* The Circumstances are very considerable, in full Parliament, from himselfe in *Cathedra*, to the representative body of the whole Kingdome.

The occasion adds much, when they desire the benefit of the Lawes, and that their Causes and Suites might be determined according to Law, and not by himselfe, at his will and pleasure upon paper Petitions.

3 Upon like occasion of pressing the Lawes and Statutes, That hee would make an *Act of Counsell board in that Kingdome as binding as an Act of Parliament.*

4. He made his words good by his actions; assumed and exercised a boundlesse and lawlesse Jurisdiction over the lives persons,

persons, and estates of his Majesties Subjects, procured judgement of death against a Peere of that Realme, commanded another to be hanged, this was accordingly executed, both in times of high Peace, without any proceffe or colour of Law.

5. By force for a long time he seized the yarne and flax of the Subjects, to the starving and undoing of many thousands, besides the Tobacco businesse, and many Monopolies and unlawfull Taxes, forced a new Oath not to dispute his Majesties royall commands, determined mens estates at his owne will and pleasure upon paper Petitions to himselfe, forced Obedience to these, not onely by Fines and Imprisonment, but likewise by the Army, seized Souldiers upon the refusers in a hostile manner.

6. Was an Incendiary of the warre betweene the two Kingdomes of *England* and *Scotland*.

My Lords, we shall leave it to your Lordships Judgements, whether these words, Counsells, and Actions would not have beene a sufficient Evidence to have proved an Inditement drawne up against him, as those before mentioned, and many others, are; That they were spoken and done to the intent to withdraw the Kings heart from the people, and the affections of the people from the King, that they might leave the King, and afterwards rise up against him to the destruction of the King; if so, here is a compassing of the Kings death within the words of the Statute of the five and twentieth yeare of *Edward* the third, and that warranted by many former judgements.

My Lords, I have now done with the three Treasons within the Statute of the five and twentieth of *Edward* the third. I proceed to the fourth upon the Statute of the eighteenth yeare of *Henry* the sixth, Chapter the third in *Ireland*; I shall make bold to read the words to your Lordships, The fourth, generall Head.

That no Lord, nor any other of what condition soever he be, shall bring or lead hoblers, kervies, or hooded men; nor any other people, nor horses to lie on horseback, or on foot upon the Kings Subjects without their good wills and consent, but upon their owne costs, and without hurt doing to the Commons, and if any so doe he shall be judged as Traitor.

1. The Argument that hath been made concerning the Person, That

That it extends not to the King, and therefore not to him, weighs nothing with your Lordships, *Rex non habet in regno parem*, from the greatnesse of his office to argue himsele into the same impossibility with his sacred Majelty of being incapable of High-Treason, it's an Offence, no reason; The words in the Statute, *No Lord nor any other of what condition soever he be*, includes every Subject.

In *Trinity Terme* in the three and thirtieth yeare of *Henry* the eighth, in the Kings Bench, *Leonard Lord Gray*, having immediately before been Lord Deputy of *Ireland*, is attainted of High-Treason, and judgement given against him for letting divers Rebels out of the Castle of *Dublin*, and discharging Irish hostages and pledges that had been given for securing the Peace, for not punishing one that said the King was an Heretique, I have read the whole Record, ther's not one thing laid to his charge but was done by him as Lord Lievtenant: Hee had the same Plea with my Lord of *Strafford*, That thesethings were no adhering to the Kings Enemies, but were done for reasons of State, That he was not within those words of the Statute of the five and twentieth yeare of *Edward* the third, himsele being Lord Lievtenant there, they cost his life.

Obj. 2. It hath been said, That the Souldiers, fessed upon the Subjects by him, were not such persons as are intended by that Statute, *Hoblers, Kernes, and hooded men*, these rase all people.

Answ. My Lords, they were the names given to the Souldiary of those times, *Hoblers* horsemen, the other the foot, but the words of the Statute goe further, *Nor any other people, neither horse nor foot*, his Lordship fessed upon them both horse and foot.

Objekt. 3. The Statute extends only to them that leade or bring, *Savill* led them, my Lord onely gave the warrant.

Answ. To that I shall say onely thus, *plus peccat auctor quam actor*, by the rule of Law, *agentes & consentientes pari plebuntur pena*, if consent, much more a command to doe it, makes the commander a Traitor. If there bee any Treason within this Statute, my Lord of *Strafford* is guilty.

It hath been therefore said, That this Statute like *Goliath's sword* hath been wrapt up in a cloth and laid behind the doore, that it hath never been put in execution.

Answ.

Answ. My Lords, if the Clerk of the Crown in *Ireland* had certified your Lordships that upon search of the Judgements of Attainders in *Ireland*, he could not finde that any man had been attainted upon this Statute, your Lordships had had some ground to believe it; yet it is onely my Lord of *Straffords* affirmation: Besides your Lordships know that an act of Parliament binds untill it be repealed.

It hath been therefore said, that this Statute is repealed by the Statutes of the eighth yeere of *Edward* the fourth, the first Chapter; and of the tenth yeere of *Henry* the seventh, the two and twentieth Chapter, because by these two Statutes, the English Statutes are brought into *Ireland*.

The Argument, (if I mistook it not,) stood thus; That the Statute of the first of *Henry* the fourth, the 10. Chapter, saith, that in no time to come, Treason shall be adjudged otherwise, then it was ordained by the Statute of the 25. yeere of *Edward* the third: That the Treason mentioned in the 18 yeere of *Henry* the sixth in the Irish Statute is not contained in the Statute of the 25 yeere of *Edward* the 3. and therefore being contrary to the statute of the first of *Henry* the fourth, it must needs be void.

My Lords, the difference of the times wherein the Statute of the first yeere of *Henry* the fourth, and that of the 18 yeere of *Henry* the sixth were made, cleare the Point, as is humbly conceived; that of *Henry* the sixth was made forty yeeres after the other.

The statute of the eighth yeere of *Edward* the fourth, and the tenth of *Henry* the seventh, bringing in the English statutes in order and series of time, as they were made one after another (as afterwards is proved they did) it cannot be that the statute of the first yeere of *Henry* the fourth made forty yeere before, should repeale or make void the statute of the 18. *Henry* 6. made so long after. The rule of Law is, that *Leges posteriores priores abrogant*, that latter lawes repeale former: But by this construction a former Law should repeale and make void a *Non ens*; a statute then was not.

If this were Law, then all the statutes that made any new Treason after the first yeere of *Henry* the fourth, were void in the very fabricke, and at the time when they were made; hence likewise it would follow, that the Parliament, now upon what occasion soever, hath no power to make any thing Treason not declared to be so in the statute of the five and twentieth yeere of *Edward* the third; This your Lordships easily see would make much for my Lord of

Stafford's advantage; but why the Law should be so, your Lordships as yet have onely heard an affirmation of it, no reason.

But some touch was given, that this statute of the tenth yeere of *H. the seventh*, in words makes all the Irish statutes void, which are contrary to the English. The Answer to this, is a deniall that there are any such words in the statute: This statute declares, that the English statutes shall be effectuell and confirmed in *Ireland*, and that all statutes, before time, made to the contrary shall be revoked: this repeales onely the Irish statutes of the tenth yeere of *Henry the fourth*, and the nine and twentieth yeere of *Henry the sixth*, which say that the English statutes shall not be in force in *Ireland*, unlesse particularly received in Parliament; It makes all the Irish statutes void, which say that the English statutes shall not be in force there.

It is usuall when a Statute saith, that such a thing shall be done or not done, to adde further that all statutes to the contrary shall be void.

No likeli-hood that this statute intended to take away any statute of Treason; When but in the Chapter next before this, Murder there is made Treason, as if done upon the Kings Person.

That this statute of the eighteenth yeere of *Henry the sixth* remains on foot and not repealed, either by the Statute of the eighth yeere of *Edward the fourth*, or this of the tenth yeere of *Henry the seventh*, appeares expressely by two severall Acts of Parliament, made at the same Parliament of the tenth yeere of *Henry the seventh*.

By an Act of Parliament in *H. the sixth's* time, in *Ireland*, it was made Treason for any man to procure a privie Seale, or any other Command whatsoever, for apprehending any person in *Ireland* for Treason done without that Kingdome, and to put any such Command in execution; Divers had been attainted of Treason for executing such Commands: Heere is a Treason so made by Act of Parliament in *Henry the sixth's* time: In the third Chapter of this Parliament of the tenth of *Henry the seventh*, an Act is passed for no other end, then to repeale this statute of *Henry the sixth*, of Treason.

If this statute of *Henry the sixth* of Treason, had been formerly repealed by the statute of 8. *Edward 4.* or then by the two and twentieth Chapter of this Parliament of 10. *Henry 7.* by bringing in the English statutes, the Law-makers were much mistaken, now to make a particular Act of Parliament to repeale it, it being likewise so unreasonable an Act as it was.

In the eighth Chapter of this Parliament, of the tenth of *Henry the seventh*; It is enacted, That the statutes of *Kilkenny* and all other statutes made in *Ireland* (two onely excepted, whereof this of the eighteenth of *Henry the sixth* is none) for the Common-weale shall be enquired off and executed. My Lord of *Strafford* saith, that the bringing in of the *English* statutes, hath repealed this statute of the eighteenth yeere of *Henry the sixth*; the Act of Parliament made the same time saith no; it saith that all the *Irish* statutes, excepting two, whereof this is none, shall still be in force.

Object. Oh! But how ever it was in 10. *H. 7.* yet it appears by Judgement in Parliament afterwards, That this statute of the eighteenth yeere of *Henry the sixth* is repealed, and that is by the Parliament of the eleventh yeere of *Queene Elizabeth*, the seventh Chapter, That by this Parliament it is enacted, that if any man without license from the Lord Deputie, lay any Souldiers upon the Kings Subjects, if he be a Peere of the Realme, he shall forfeit one hundred pounds, if under the degree of a Peere, 100 markes. This statute, as is alleadged, declares the penalty of laying Souldiers upon the Subjects, to bee onely a hundred pounds; and therefore its not Treason.

Answer, My Lords, if the offence for which this penalty of one hundred pounds, is laid upon the offender, be for laying Souldiers, or leading them to doe any acts offensive or invasive upon the Kings people, The Argument hath some force; but that the offence is not for laying Souldiers upon the true Subjects, that this is not the offence intended in the statute, will appeare to your Lordships, *Ex absurdo*, from the words of it.

The words are, That if any man shall assemble the people of the County together to conclude of peace, or warre; or shall carry those people to doe any Acts offensive or invasive, then he shall forfeit one hundred pounds; If concluding of warre and carrying the people to Acts invasive, be against the Kings Subjects, this is high Treason within the words of the statute of the five and twentieth yeere of *Edward the third*: For if any Subject shall assemble the people and conclude a warre, and accordingly shall lead them to invade the Subject, this is a levying of warre within the word of that statute; and then the statutes of the five and twentieth yeere of *Edward the third*, the first of *Henry the fourth*, and the first of *Queene Mary*, which the Earle of *Strafford* in his Answer desires to be tryed by, are as well repealed in this point, as the statute of the eighteenth yeere of *Henry*

the sixth, he might then without feare of Treason have done what he pleased with the Irish Army; for all the statutes of levying war, by this statute of the eleventh yeer of *Queene Elizabeth* were taken out of his way.

In *Ireland* a Subject gathers forces, concludes a warre against the Kings people, actually invades them; bloodshed, burning of houses, Depredations ensue; two of those, that is, murder and burning of houses are Treason, and there the other felony; by this construction the punishment of Treason and felony is turned onely into a fine of one hundred pounds; from losse of life, lands, and all his goods, onely to losse of part of his goods.

3 The third absurdity; a warre is concluded, three severall Inrodes are made upon the Subject; in the first, a hundred pound damage; in the second, five thousand pounds dammage; in the third, ten thousands pound dammage is done to the Subjects; the penalty for the last inrode is no more than for the first, onely one hundred pounds. This statute by this construction tells any man how to get his living without long labour.

Two parts of the hundred pounds is given to the King, a third part to the informer; here's no dammage to the Subject that is robbed and destroyed.

My Lords, the Statute will free it selfe and the makers of it from these absurdities.

The meaning of this statute is, *That if any Captaine shall of his own head conclude of peace or war, against the Kings Enemies or Rebels, or shall upon his owne head invade them, without warrant from the King, or the Lord Deputie of Ireland, that then he shall forfeit an hundred pounds.*

The offence is not for laying of Souldiers upon the Kings people, but making of warre against the Irish Rebels without warrant; the offence is not in the matter, but in the manner, for doing a thing lawfull, but without mission.

1 This will appeare by the generall scope of the statute, all the parts being put together.

2 By particular clauses in the Statute.

3 By the Condition of that Kingdome at the time of the making of that statute.

For the first, The preamble recites that in time of Declination of Justice under pretext of defending the Countrey and themselves, di-

vers great men arrogated to themselves Regall authority under the names of Captaines, that they acquired to themselves that government which belonged to the Crown. for preventing this It is enacted, that no man dwelling within the Shire grounds, shall thenceforth assume or take upon himselfe the authority or name of a captaine within those Shire grounds, without Letters Pattents from the Crowne, nor shall under colour of his captaine-ship make any demand of the people of any exaction, nor as a captaine assemble the people of the shire grounds; nor as a captaine shall lead those people to doe any acts offensive or invasive without warrant under the great Seale of *England*, or of the Lord Deputy, upon penalty that if he do any thing contrary to that act, then the Offender shall forfeit an hundred pounds.

My Lords, the Rebels had been out, the courts of justice scarce sate for defence of the countrey, diverse usurped the place of Captaines, concluded of warre against the Rebels and invaded them without warrant; invading the Rebels without authority is the crime.

2. This appeares further by the particular clauses in the statute; None shall exercise any captaine-ship within the shire grounds, nor assemble the men of the shire grounds to conclude of warre, or lead them to any invasion.

That that had anciently beene so continued to this time, that is, the Irish and the *English* pale, they within the shire grounds were within the *English* pale, and *ad fidem & legem Anglia*; the Irish that were without the pale were enemies alwayes either in open act of hostility or upon leagues, and hostages given for securing the peace. And therefore as here in *England*, we had our marches upon the frontiers in *Scotland* and *Wales*, so were their Marches betweene the *English* and Irish pale, where the inhabitants held their Lands by this tenure to defend the Countrey against the Irish, as appeares in the close Rols of the Tower in the twentieth yeere of *Edward* the third, *membrana* 15. on the back-side; and in an Irish Parliament held the 42. yeere of *Edward* the 3. Its declared, that the *English* pale was almost destroyed by the Irish enemies, and that there was no way to prevent the danger, but onely that the owners reside upon their Lands for defence, and that absence should bee a forfeiture. This act of Par-

liament in a great counsell here was affirmed, as appeares in the close Roll, the 22. yeere of *Edward the third*, *membra. 20. dorset.*

Afterwards as appeares in the Statute of the 28. yeere of *Henry the 6. in Ireland*, this hostility continued betweene the English marches and the Irish enemies, who by reason there was no difference betweene the English marches and them, in their apparell, did daily not being knowne to the English, destroy the English within the pale. Therefore its enacted, that every *Englishman shall shave the haire of his upper lip, for distinction sake.* This hostility continued, till the 10. yeere of *Henry the 7.* as appeares by the Statute of the tenth of *Henry the 7. the 17. Chapter*; and so successively downeward, till the making of this very statute of the 11. yeere of *Queene Elizabeth*, as appeares fully in the ninth chapter.

Nay immediately before, and at the time of the making of this statute, there was not onely enmity betweene those of the Shire grounds; that is, the English and Irish pale; but open Warre and Acts of hostility, as appeares by History of no lesse authority, then that statute it selfe. For in the first Chapter of this statute is the Attainder of *Shane O Neale*, who had made open Warre, was slaine in open Warre. It's there declared, that he had gotten by force all the North of *Ireland*, for an hundred and twenty miles in length, and above a 100. in breadth; that hee had mastered divers places within the *English pale.* When the flame of this warre by his death immediately before this statute was spent, yet the fire-brands were not all quenched; for the rebellion was continued by *Iohn Fitz Gerard* called the white Knight, and *Thomas Queverford*: This appeares by the Statute of the 13. yeere of *Queene Elizabeth in Ireland*, but two yeeres after this of the eleventh yeere of *Queene Elizabeth*, where they are attainted of high treason, for levying Warre this eleventh yeere, wherein this Statute was made.

So that my Lords, immediately before, and at the time of the making of this Statute, there being Warre betweene those of the Shire grounds mentioned in this statute, and the Irish, the concluding of Warre, and Acts offensive and invasive there mentioned, can bee intended against no others, but the Irish enemies.

Againe

Againe the words of the statute are; no captaine shall assemble the people of the Shire grounds to conclude of peace or warre: Is it to bee presumed that those of the Shire grounds will conclude of Warre against themselves? nor saith the statute shall carry those of the Shire grounds to doe any Acts invasive; by the construction which is made on the other side, they must be carried to fight against themselves.

Lastly the words are; As captaine, none shall assume the name or authority of a captaine, or as a captaine shall gather the people together, or as a captaine lead them. The offence is not in the matter, but in the manner: If the acts offensive were against the Kings good Subjects, those that went under command were punishable, as well as the Commanders; but in respect, the Souldiers knew the service to bee good in it selfe being against the enemies, and that it was not for them to dispute the authority of their commanders, the penalty of a 100. pounds is laid onely upon him, that as Captaine shall assume this power without warrant: The people commanded are not within the Statute.

My Lords, the logicke whereupon this argument hath been framed stands thus; Because the statute of the eleventh yeere of *Queene Elizabeth* inflicts a penalty of a 100. pound, and no more upon any man, that as a captaine without warrant, and upon his owne head shall conclude of, or make Warre against the Kings enemies: therefore the statute of the 18. yeere of *Henry* the sixth is repealed, which makes it Treason to lay souldiers upon, or to levie war against the Kings good people.

But my Lords, observation hath been made upon other words of this statute, that is, that without licence of the Deputy, these things cannot be done: This shewes, that the Deputy is within none of the statutes.

My Lords, this Argument stands upon the same reason with the former, because hee hath the ordering of the Army of *Ireland* for the defence of the people, and may give warrant to the Officers of the Army, upon eminent occasions of invasion, to resist:

resist or prosecute the enemy, because of the danger that else might ensue forthwith by staying for a warrant from his Majesty out of *England*; Therefore it is no Treason in the Deputy to imploy the Army in *Ireland*, whensoever hee pleaseth, for the subversion of the Kings good people, and of the Lawes.

My Lords, the statute of the tenth yeere of *Henry* the seventh the 17. Chapter touched upon for this purpose, cleares the businesse in both points; for there it is declared, that none ought to make warre upon the Irish rebels and enemies, without warrant from the Lieutenant, the forfeiture a 100 pounds as here the statute is the same with this, and might as well have beene cited for repealing the statute of the eighteenth yeere of *Henry* the 6. as this of the 11. yeere of *Queene Elizabeth*: but if this had been insisted upon, it would have expounded the other two cleare against him.

Object. My Lords, it hath been further said, although the statute be in force, and there be a Treason within it, yet the Parliament hath no jurisdiction; the Treasons are committed in *Ireland*, therefore not triable here.

Answ. My Lords, Sir *Iohn Perrot* his predecessors in the 24. yeere of *Queene Elizabeth* was tried in the Kings bench for Treason done in *Ireland*, when he was Deputy; *Orucke* in the 33. yeere of *Queene Elizabeth* judged heere for Treason done *Ireland*.

Object. But it will be said, these trials were after the statute of the 34. yeere of *Henry* the eight, which enacts, that treasons beyond sea may be tried in *England*.

Answ. My Lords, his predecessor my Lord *Gray* was tried and adjudged here in the Kings bench, that was in Trinity terme in the 33. yeere of *Henry* the eighth, this was before the making of that statute.

Object. To this againe will be said, that it was for Treason by the Lawes and statutes of *England*; but this is not for any thing, that's Treason by the Law of *England*, but by an Irish statute.

So that the question is onely, whether your Lordships in Parliament here have cognisance of an offence made treason by an Irish

Irish statute in the ordinary way of judicature without bill, for so is the present question.

For the clearing of this, I shall propound two things to your Lordships consideration:

1. Whether the rule for expounding the Irish Statutes and customes bee one, and the same in *England*, as in *Ireland*.

2. That being admitted, whether the Parliaments in *England* have cognizance or jurisdiction of things there done in respect of the place, because the Kings writ runnes not there.

For the first, if in respect of the place, the Parliament here hath cognizance there; And secondly, if the rules for expounding the *Irish* statutes and Customes bee the same here as there, this exception as I humbly conceive, must fall away:

In *England* there is the common law, the statutes, the acts of Parliament, and customes peculiar to certaine places, differing from the common Law; if any question arise concerning either a custome or an act of Parliament, the common Law of *England*, the first, the primitive and the generall Law, that's the rule and expositour of of them and of their severall extents; it is so here, it is so in *Ireland*; the common Law of *England* is the common Law of *Ireland* likewise; the same here and there in all the parts of it.

It was introduced into *Ireland* by King *Iohn*, and afterwards by King *Henry* the third by act of Parliament held in *England*, as appeares by the patten Roll of the 30 yeere of King *Henry* the third, the first membranâ. The words are, *Quia pro communi utilitate terra Hibernia, & unitate terrarum Regis, Rex vult, & de communis consilio Regis provisum est, quod omnes leges & consuetudines que in regno Anglie tenentur, in Hibernia teneantur, & eadem terra eisdem legibus subjaceat, & per easdem regatur, sicut Dominus Johannes Rex cum ultimo esset in Hibernia, statuit, & fieri mandavit. Quia, &c. Rex vult quod omnia brevia de*
E
communi

communi Jure que currunt in Anglia, similiter currant in Hibernia sub novo sigillo Regis, mandatum est Archiepiscopis, &c. quod pro pace & tranquillitate ejusdem terra, per easdem leges eos regi & deduci permittant, & eas in omnibus sequantur. In cujus, &c. Teste Rege, apud Woodstock, decimo nono die Septembris.

Here's an union of both Kingdomes, and that by act of Parliament, and the same Lawes to be used heere as there, in omnibus.

My Lords, That nothing might be left here for an exception, that is, that in treasons, felonies, and other capitall offences concerning life, the Irish lawes are not the same as here. Therefore it is enacted in a Parliament held in England in the 14. yeere of Edward the second (it is not in print neither, but is in the Parliament booke) That the Lawes concerning life and member shall be the same in Ireland, as in England.

And that no exception might yet remaine, in a Parliament held in England, the fifth yeere of Edward the third, It is enacted: *quod una & eadem Lex fiat tam Hibernicis, quam Anglicis.* This act is enrolled in the Patent rolls of the fifth yeere of Ed. the 3. part. 1. membr. 25.

The Irish therefore receiving their Lawes from hence, they send their Students at Law to the Innes of Courts in England, where they receive their degree; and of them, and of the common Lawyers of this kingdome, are the Judges made.

The petitions have been many from Ireland, to send from hence some Judges more learned in the Lawes then those they had there.

It hath been frequent in cases of difficulty there, to send some times to the Parliament here, sometimes to the King by advice from the Judges here, to send them resolutions of their doubts: Amongst many I'll cite your Lordships onely one, because it is in a case of treason upon an Irish statute, and therefore full to this point.

By a Statute there made in the fifth yeere of Edward the fourth, there is provision made for such, as upon suggestions
are

are committed to prison for Treason, that the party committed, if he can procure 24 Compurgators, shall be bailed, and let out of prison.

Two Citizens of *Dublin* were by a grand Jury presented to have committed Treason; They desired the benefit of this statute, that they might be let out of prison upon tender of their Compurgators. The words of the Statute of the 5. yeere of *Ed.* the fourth in Ireland being obscure, the Judges there not being satisfied what to doe, sent the case over to the *Queene* desired the opinion of the Judges here; which was done accordingly: The Judges here sent over their opinion, which I have out of the Book of Justice *Anderson*, one of the Judges consulted withall. The Judges here delivered opinion upon an Irish Statute in case of Treason.

If it be objected, That in this case the Judges here did not judge upon the party; their opinions were only *ad informandam conscientiam* of the Judges in Ireland; that the judgement belonged to the Judges there.

My Lords, with submission, this and the other Authorities prove that for which they were cited; that is, That no absurdity, no failer of justice would ensue, if this great Judicatory should judge of Treason so made by an Irish Statute.

The common Law, the rule of judging upon an Irish Statute, the Pleas of the Crowne for things of life and death, are the same here and there. This is all that hath yet beene offered.

For the second point, That England hath no power of Judicature for things done in *Ireland*; My Lords, the constant practice of ages proves the contrary.

Writs of error in Pleas of the Crowne, as well as in civill causes, have in all Kings reignes been brought here, even in the inferiour Courts of *Westminster Hall*, upon judgements given in the courts of Ireland: The practice is so frequent, and so well known, as that I shall cite none of them to your Lordships: no president will (I beleeye) be produced to your Lordships, that ever the case was remanded back againe into Ireland, because the question

rose upon an Irish Statute, or custome.

Object. But it will bee said, That writs of error are onely upon a failer of justice in Ireland; and that suits cannot originally bee commenced here for things done in Ireland, because the Kings writ runs not in Ireland.

Answ. This might be a good plea in the Kings Bench, and inferiour Courts at Westminster Hall; the question is, whether it bee so in Parliament. The Kings writ runs not within the County Palatine of Chester and Durham, nor within the five Ports; neither did it in Wales before the union in *Henry* the eighth's time; after the Lawes of England were brought into Wales in King *Edward* the first's time, suits were not originally commenced in Westminster Hall, for things done in them, yet this never excluded the Parliament: suits for life, lands, and goods within those jurisdictions are determinable in Parliament, as well as in any other parts of the Realme.

Ireland, as appears by the statute of the thirtieth yeere of *Henry* the third, before mentioned, is united to the Crowne of England.

By the Statute of the eight and twenty yeere of *Henry* the sixth in *Ireland*, it is declared in these words; That *Ireland* is the proper Dominion of England, and united to the Crowne of England, which Crowne of England is of it selfe, and by it self, fully, wholly, and entirely endowed with all power and authority sufficient to yeeld to the subjects of the same full and plenary remedy, in all debates and suits whatsoever.

By the Statute of the 33. yeere of *Henry* the eighth, the first Chapter, when the Kings of England first assumed the title of King of *Ireland*, it is there enacted, That *Ireland* still is to bee held as a Crowne annexed and united to the Crowne of England.

So that by the same reason; from this, that the Kings writ runs not in *Ireland*, it might aswell be held, that the Parliament cannot originally hold plea of things done within the County Palatine of Chester and Durham, nor within

within the five Ports and Wales; *Ireland* is part of the Realme of England, as appears by those statutes, as well as any of them.

This is made good by constant practice. In all the Parliament rolls, from the first to the last, there are receivers and tryers of petitions appointed for *Ireland*. For the Irish to come so farre with their petitions for justice, and the Parliament not to have cognizance, when from time to time they had in the beginning of the Parliament appointed receivers and tryers of them, is a thing not to be presumed.

An appeale in *Ireland* brought by *William Lord Vesce* against *John Fitz Thomas* for treasonable words there spoken, before any Judgement given in the case there, was removed into the Parliament in England, and there the defendant acquitted, as appears in the Parliament pleas of the two and twentieth yeere of *Edward* the first.

The suits for lands, offices, and goods, originally begun here, are many; and if question grew upon matter in fact, a Jury usually ordered to try it, and the verdict returned into Parliament, as in the case of one *Balliben*, in the Parliament of the five and thirtieth yeere of *Edward* the first. If doubt arose upon a matter tryable by Record, a writ went to the Officers in whose custody the Record remained, to certifie the Record, as was in the case of *Robert Bagot* the same Parliament of the five and thirtieth yeere of *Edward* the first, where the writs went to the Treasurer and Barons of the Exchequer.

Sometimes they gave judgement here in Parliament, and commanded the Judges there in *Ireland* to doe execution, as in the great case of Partition betweene the copartners of the Earle Marshall, in the Parliament of the 32. yeere of *Edward* the first, where the writ was awarded to the Treasurer of *Ireland*.

My Lords, The Lawes of *Ireland* were introduced by the Parliaments of England, as appears by three Acts of Parliament before cited.

It is of higher jurisdiction *dare Leges*, then to judge by them.

The Parliaments of England doe binde in Ireland, if Ireland be particularly mentioned, as is resolved in the Book case of the first yeere of *Henry* the seventh, *Cokes* seventh Report, *Calvins* case, and by the Judges in Trinity Terme, in the three and thirtieth yeere of *Queene Elizabeth*: The Statute of the eighth yeere of *Edward* the fourth, the first Chapter in Ireland recites, that it was doubted amongst the judges, whether all the English Statutes, though not naming Ireland, were in force there; if named, no doubt.

From King *Henry* the third his time downward to the eighth yeere of *Queene Elizabeth* (by which statute it is made felony to carry sheepe from Ireland beyond seas) in almost all these Kings reignes, there be statutes made concerning Ireland.

The exercising of the *Legislative* power there over their lives and estates, is higher then of the Judiciall in question. Vntill the nine and twentieth yeere of *Edward* the third, erroneous judgements given in Ireland, were determinable nowhere, but in England; no, not in the Parliaments of Ireland, as it appears in the close rolls in the Tower. In the nine and twentieth yeere of *Ed.* the third, *mem.* 12. Power to examine and reverse erroneous judgements in the Parliaments of Ireland is granted from hence; Writs of error lie in the Parliament here upon erroneous judgements after that time given in the Parliaments of Ireland, as appears in the Parliament rolls of the eighth yeere of *Henry* the sixth, *membra.* 70. in the case of the Prior of Lenthau. It is true, the case is not determined there, for it's the last thing that came into the Parliament, and could not be determined for want of time; but no exception at all is taken to the jurisdiction.

The Acts of Parliament made in Ireland have been confirmed in the Parliaments of England, as appears by the close rolls in the Tower, in the 42. yeere of *Edward* the 3. *membra.* 20. *dorso*; where the Parliament in Ireland, for the preservation of the Countrey from the Irish, who had almost destroyed it, made an Act, that all the land-owners, that were English

English should reside upon their lands; or else they were to be forfeited: this was here confirmed.

In the Parliament of the 4. yeere of *H.* the 5. *chap. 6.* Acts of Parliament in Ireland are confirmed, and some privileges of the Peeres in the Parliaments there are regulated.

Power to repeale Irish Statutes, power to confirme them, cannot be by the Parliament here, if it hath not cognizance of their Parliaments; unlesse it be said, That the Parliament may doe, it knowes not what.

Garnesey and Jersey are under the Kings subjection, but are not parcels of the Crown of England, but of the dutchy of Normandy; they are not governed by the lawes of England, as Ireland is; and yet Parliaments in England have usually held plea of, and determined all causes concerning land, or goods. In the Parliament of 33. *E. 1.* there be *placita de Insula Ieruesey*; and so in the Parliament 14. *E. 2.* and so for Normandy and Gascoyne; and alwayes as long as any part of France was in subjection to the Crown of England, there were at the beginning of Parliaments, receivers and tryers of petitions for those parts appointed.

I beleeve your Lordships will have no cases shewed of any plea to the jurisdiction of the Parliaments of England, in any thing done, in any parts wheresoever, in subjection to the Crown of England.

The last thing I shall offer to your Lordships is the case of 19. *El.* in my Lord Dyer 306. and Judge Comptons book of the jurisdiction of Courts, fol. 23. The opinion of both these books is, that an Irish Peere is not triable here. It's true, a Scottish or French Nobleman is triable here as a common person; the Law takes no notice of their Nobility, because those Countreyes are not governed by the Lawes of England; but Ireland being governed by the same Lawes, the Peeres there are triable according to the Law of England, onely *per pares*.

By the same reason the Earle of Strafford, not being a peere of Ireland, is not triable by the Peeres of Ireland; so that if he be not triable here, he is triable no where.

My Lords, In case there be a Treason and a Traitor within the statute, and that he be not triable here for it in the ordinary way

way of judicatory, if that jurisdiction failes, this by way of Bill doth not; Attainders of Treason in Parliament are as legall, as usuall by Act of Parliament, as by Judgement.

I have now done with the statutes of 25. E. 3. and 18. H. 6. My Lord of Strafford hath offended against both the Kingdomes, and is guilty of high Treason by the Lawes of both.

My Lords, In the fifth place I am come to the Treasons at the common Law, the endeavouring to subvert the fundamentall Lawes and government of the Kingdome, and to introduce an arbitrary and tyrannycall government.

In this I shall not at all labour to prove, that the endeavouring by words, counsells, and actions to subvert the Lawes, is treason at the common Law, if there be any common-Law-treasons at all left; nothing treason, if this not, to make a Kingdome no Kingdome: take the politie and government away, England's but a peece of earth, wherein so many men have their commorancy and abode, without rankes or distinction of men, without property in any thing further then possession; no Law to punish the murdering or robbing one another.

That of 33. H. 8. of introducing the Imperiall Law, sticks not with your Lordships: It was in case of an appeal to Rome: These appeals in cases of marriages, and other causes counted Ecclesiasticall, had been frequent, had in most Kings reignes been tollerated; some in times of popery put a conscience upon them, the statutes had limitted the penally to a *Premunire* only: Neither was that a totall subversion, only an appeal from the Ecclesiasticall Court here in a single cause to the Court at Rome; and if treason or not, that case proves not; a treason may be punished as a felony, a felony as a trespassse, if his Majesty so please; the greater includes the lesser: In the case of *Premunire* in the Irish reports, that which is there declared to be treason, proceeded upon onely as a *Premunire*.

The thing most considerable in this is, whether the treasons at common Law be taken away by the Statute of 25. E. 3. 1. H. 4. or 1. Q. M. or any of them.

My Lord, to say they be taken away by the Stat. of 25. E. 3. is to speak against the direct words and scope of that Statute.

In it there's this clause, *That because many other like cases of treason might fall out, which are not there declared, therefore it is enacted, That if any such case come before the Judges, they shall not proceed to Judgement till the case be declared in Parliament, whether it ought to be adjudged treason, or not.*

These words, and the whole scope of that Statute shewes, that it was not the meaning to take away any treasons that were so before, but only to regulate the jurisdiction and manner of triall. Those that were single and certaine Acts, as conspiring the Kings death, levying war, counterfeiting the money, or great Seale, killing a Judge, these are left to the ordinary Courts of justice; the others not depending upon single Acts, but upon constructions and necessary inferences, they thought it unfit to give inferior Courts so great a latitude here, as too dangerous to the subject; those they strained to Parliaments.

This statute was the security of the subject, made with such wisdom as all the succeeding ages have approved it: It hath often passed through the furnace, but, like gold, hath lost little or nothing.

The statute of 1. H. 4. cap. 10. is in these words, *Whereas in the Parliament held the 21 yeere of Richard the 2. divers pains of treasons were ordained, insomuch, that no man did know how to behave himselfe, to doe say, or speake, It is accorded, that in no time to come any treason be adjudged otherwise then it was ordained by the Statute of 25. E. 3.*

It hath been said, to what end is this statute made, if it takes not away the common Law treasons remaining after the statute of 25. Edward 3.

There be two maine things which this statute doth: First it takes away for the future all the treasons made by any statute since 25. E. 3. to 1. H. 4. even to that time: For, in respect that by another Act in that Parliament, the statute of 21. R. 2. was repealed, it will not be denied, but that this statute repeals more treasons then these of 21. R. 2. it repeals all statute treasons but those in 25. E. 3.

Secondly, It not only takes away the statute treasons, but likewise the declared treasons in Parliament after 25. E. 3. as to the future. After declaration in Parliament the inferior Courts might judge these treasons; for the declaration of a treason in Parliament after it was made, was sent to the inferior Courts, that *troubles* the like case fell out, they might proceed therein: the sub-

ject for the future was secured against these; so that this statute was of great use.

By the very words of it, it still refers all treasons to the provision of 25. E. 3. it leaves that entire and upon his old bottom.

The statute of 1. Q. M. cap. 1. saith, *That no offences made treason by any Act of Parliament, shall thenceforth be taken or adjudged to be treason, but onely as be declared and expressed to be treason, by the statute of 25. E. 3. concerning treason, or the declaration of treason and no others: And further provides that no pains of death, penalty, or forfeiture, in any wise shall ensue for committing any treason, other then such as be in the statute of 25. E. 3. ordained and provided; any Acts of Parliament, or any declaration, or matter to the contrary, in any wise notwithstanding.*

By the first part of this statute, onely offences made treason by Act of Parliament are taken away, the Common Law treasons are no way touched: The words (*and no others*) referre still to offences made treason by Act of Parliament; they restrain not to the treasons onely particularly mentioned in the statute of 25. E. 3. but leaue that statute entire as to the Common-law treason, as appears by the words immediatly foregoing.

By the second part, for the pains and forfeitures of treasons, if it intend onely the punishment of treason, or if it intend both treason and punishment, yet all is referred to the provision and ordinance of 25. E. 3. any Act of Parliament, or other declaration, or thing notwithstanding.

It saith not, other then such penalties, or treasons as are expressed and declared in the statute of 25. E. 3. that might perhaps have restrained it to those that are particularly mentioned: No, it refers all treasons to the general ordination and provision of that statute, wherein the Common-law treasons are expressly kept on foot.

If it be askt what good this statute doth, if it take not away the the Common-law treasons.

1. It takes away all the treasons made by Act of Parliament, not only since the first of H. 4. which were many, but all before 1. H. 4. even untill 25. E. 3. by expresse words.

2. By expresse words, it takes away all declared treasons, if any such had been made in Parliament, these for the future are likewise taken away; so that whereas it might have been doubted, whether the statute of 1. H. 4. took away any treasons but those of 21. and 22. R. 2. this clears it both for treasons made by Parliament,

liament, or declared in Parliament, even to the time of taking the statute.

This is of great use, of great security to the subject; so that as to what shall be treason, and what not, the statute of 25. E. 3. remains entire, and so by consequence the treasons at the Common Law.

Only, my Lords, it may be doubted, whether the manner of the manner of the Parliamentary proceedings be not altered by the statute of 1. Hen. 4. the 17. cap. and more fully in the Parliament roll num. 144. that is, whether since that statute the Parliamentary power of declaration of treasons, whereby the inferiour Courts received jurisdiction, be not taken away and restrained only to Bill; that so it might operate no further, than to that particular contained in the Bill; that so the Parliamentary declarations for after times should be kept within the Parliament it selfe, and be extended no further. Since 1. H. 4. we have not found any such declarations made, but all Attainders of treason have been by Bill.

If this be so, yet the common-Law-treasons still remaining, there is one and the same ground of reason and equity since 1. H. 4. for passing of a Bill of treason, as was before for declaring it without Bill.

Herein the *Legislative* power is not used against my Lord of *Stratford* in the Bill; it is only the jurisdiction of the Parliament.

But, my Lords, because that either through my mistaking of the true grounds and reasons of the Commons, or my not pressing of them with apt arguments and precedents of former times; or that perchance your Lordships from some other reasons and authorities more swaying with your Lordships judgements, then these from them, may possible be of a contrary and dubious opinion concerning these treasons, either upon the statutes of 25. E. 3. and 18. H. 6. or at the Common Law.

My Lords, if all these five should faile, they have given me further in command to declare to your Lordships some of their reasons, why they conceive that in this case the meere *Legislative* power may be exercised.

Their reasons are taken from these three grounds:

1. From the nature and quality of the offence.
2. From the frame and constitution of the Parliament wherein this Law is made.
3. From practices and usages of former times.

The horridnesse of the offence in endeavouring the overthrowing the Lawes and present government, hath been fully opened

so your Lordships heretofore.

The Parliament is the representation of the whole Kingdome, wherein the King as Head, your Lordships as the more noble, and the Commons the other members, are knit together in one body politick: This dissolves the arteries and ligaments that hold the Body together, the Lawes: He that takes away the Lawes, takes not away the allegiance of one subject alone, but of the whole Kingdome.

It was made Treason by the statute of 13. *El.* for her time, to affirme, That the Lawes of the Realme doe not bind the descent of the Crowne; no Law, no descent at all.

No Lawes, no Peerage, no ranks or degrees of men; the same condition to all.

It's treason to kill a Judge upon the Bench; this kills not *Iudicem*, sed *Iudicium*: He that borrowed *Apelles*, and gave bond to return again *Apelles* the Painter, sent him home after he had cut off his right hand; his bond was broken, *Apelles* was sent, but not the Painter. There be twelve men, but no law; there's never a Judge amongst them.

Its felony to embezill any one of the judiciall records of the Kingdome; this at once sweeps them all away, and from all.

Its treason to counterfeit a twenty shilling peece; here's a counterfeiting of the Law, we can call neither the counterfeit nor true coyne our owne.

Its treason to counterfeit the great Seale for an acre of land, no property hereby is left to any land at all. Nothing treason now, either against King or Kingdome, no Law to punish it.

My Lords, If the question were asked in Westminster Hall, whether this were a crime punishable in Starre-chamber, or in the Kings Bench, by fine or imprisonment, they would say, It went higher: If whether felony, they would say, That's for an offence only against the life, or goods of some one, or few persons: It would, I beleve, be answered by the Judges, as it was by the chiefe Justice *Thurning*, in 27. *R. 2.* That though he could judge the case treason there before him, yet if he were a Peere in Parliament, he would so adjudge it.

My Lords, if it be too big for those Courts, we hope its in the right way here.

2. The second consideration is from the frame and constitution of the Parliament; the Parliament is the great body politicke, it comprehends all from the King to the begger: if so, my Lords, as the naturall, so this body, it hath power over it selfe, and every one of the members for the preservation of the whole: Its both the Physician and

and the patient: if the body be distempered, it hath power to open a veine to let out the corrupt blood for curing of it selfe; if one member be poysoned and gangren'd, it hath power to cut it off for the preservation of the rest.

But, my Lords, it hath been often inculcated, that Law-makers should imitate their supreme Law-giver, who commonly warnes before he strikes; the Law was promulged before the judgement of death for gathering of sticks; no Law, no transgression.

My Lords, to this the rule of Law is, *Frustra Legis auxilium invocat, qui in Legem committit*; from the *Lex talionis*, he that would not have had others to have law, why should he have any himselfe? why should not that be done to him, that himself would have done to others?

It's true, we give law to Hares, and Deers, because they be beasts of Chase; it was never accounted either cruelty or foule play to knock Foxes and Wolves on the head, as they can be found; because these be beasts of prey: The Warrener sets traps for Powlcats, and other Vermine, for preservation of the Warren.

Further, my Lords, most dangerous diseases, if not taken in time, they kill: Errors in great things, as Warre, and Marriage, they allow no time for repentance; it would have been too late to make a law, when there had been no law.

My Lords, for further answer to this objection, he hath offended a law, a law within, the endeavouring to subvert the lawes and polity of the State wherein he lived, which had so long, and with such faithfulness protected his Ancestry, himselfe, and his whole family; it was not *malum, quin prohibitum*, it was *malum in se*, against the dictates of the dullest conscience, against the light of nature; they, not having the law, were a law to themselves.

Besides this, he knew a law without, that the Parliament in cases of this nature had *potestatem vita & necis*.

Nay, he well knew, that he offended the promulged and ordinary rules of law: Crimes against Law have been proved, have been confessed, so that the question is not *de culpa*, *sed de pena*, what degree of punishment those faults deserve; we must differ from him in opinion, that twenty felonies cannot make a treason, if it be meant of equality in the use of the *Legislative* power: for hee that deserves death for one of these felonies alone, deserves a death more painfull, and more ignominious for all together.

Every felony is punished with losse of life, lands, and goods; a felony may be aggravated with those circumstances, as that the Par-

liament

liament with good reason may adde to the circumstances of punishment, as was done in the case of *John Hall*, in the Parliament : *H. 4.* who for a barbarous murder committed upon the Duke of Gloucester, stifling him between two feather-beds at Calice, was adjudged to be hanged, drawn, and quartered.

Batteries by Law are punishable only by fine and single damages to the party wounded.

In the Parliament held in *1. H. 4. cap. 6.* one *Savadge* committed a Battery upon one *Chedder*, servant to Sir *John Brook*, a Knight of the Parliament for Somersetshire; It's there enacted, that he shall pay double dammages, and stand convicted, if he render not himselfe by such a time : The manner of proceedings quickned; the penalty doubled, the circumstances were considered, it concerned the Common-wealth; it was Battery with breach of priviledge of Parliament.

This made a perpetuall Act, no warning to the first offender; and in the Kings Bench, as appears by the book case of *9. H. 4.* the first lease, double dammages were recovered.

My Lords, in this of the Bill, the offence is high and generall against the King and the Common-wealth, against all and the best of all.

If every felony be losse of life, lands, and goods what is misuser of the *Legislative* power, by addition of Ignominie in the death and disposall of the lands to the Crowne, the publick patrimony of the Kingdome.

But it was hoped, that your Lordships had no more skill in the Art of killing of men, than your worthy Ancesters.

My Lords, this appeale from your selves to your Ancesters we admit of; although we doe not admit of that from your Lordships to the Peeres of Ireland.

He hath appealed unto them; your Lordships will bee pleased to hear what judgement they have already given in the case, that is, the severall attenders of treason in Parliament, after the Statute of *25. E. 3.* for treasons not mentioned, without nor within that Statute, and those upon the first offenders warning given.

By the Statute of *25. E. 3.* its treason to levie war against the King : *Gomines* and *Weston* afterwards in Parliament in *1. R. 2. Num. 38, 39.* adjudged traytors for surrendring two severall Castles in France, only out of feare, without any compliance with the Enemy; this not within the Statute of *25. E. 3.*

My Lords, in *3. R. 2. John Imperiall* that came into England upon

on letters of safe conduct, as an Agent for the state of Genoa, sitting in the Evening before his door in Breadstreet, (as the words of the Records are) *paulo ante ignit egium*, John Kirby and another Citizen coming that way, casually Kirby trode upon his Toe: it being twilight, this grew to a quarrell, and the Ambassador was slaine; Kirby was indicted of high treason, the indictment findes all this, and that it was only done *se defendendo*, and without malice: The Iudges, it being out of the statute of 25. E. 3. could not proceede; the Parliament declared it treason, and judgement afterwards of high treason, ther's nothing can bring this within the statute of 25. E. 3. but it concerns the honour of the Nation, that the publick faith should be strictly kept: It might endanger the traffick of the kingdome; they made not a Law first, they made the first man an example. This is in the Parliament Roll, 3. R. 2. num. 18. and *Hilary Terme*, 3. R. 2. Rot. 31. in the Kings Bench, where judgement is given against him.

In 11. R. 2. *Trefilian*, and some others attainted of treason for delivering opinions in the subversion of the Law, and some others for plotting the like: My Lords, the case hath upon another occasion been opened to your Lordship only this is observable, That in the Parliament of the 1. yeere of Henry the third, where all treasons are againe reduced to the Statute of 25. Edward 3. these Attainders were by a particular Act confirmed and made good, that the memory thereof might be transmitted to succeeding ages: They stand good to this day; the offences there, as here, were the endeavouring the subversion of the lawes.

My Lords, after 1. Henry the fourth, Sir John Mortimer being committed to the Tower upon suspicion of treason, brake prison, and made an escape: This no way within any Statute, or any former Judgement at common Law; for this, that is, for breaking the prison onely, and no other cause, in the Parliament held the second yeere of Henry the sixth he was attainted of high treason by Bill.

My Lords, poysoning is onely murder; yet one Richard Coke having put poyson into a pot of potage, in the kitchen of the Bishop of Rochester, whereof two persons dyed, hee's attainted of Treason, and it was enacted that he should be boyled to death by the statute of 22. H. 8. cap. 9.

By the statute of 25. H. 8. *Elizabeth Barton*, the holy maid of Kent, for pretending revelations from God, that God was highly displeased with the King for being divorced from the Lady *Katherine*; and that in case he persisted in the separation, and should marry another, that

that he would not continue King above one month after; because this tended to the depriving of the lawfull succession to the Crown, she is attainted of Treason,

In the Parliament 2. and 3. *H. 6. cap. 16.* the Lord Admirall of England was attainted of Treason for procuring the Kings Letters to both Houses of *Parliament*, to be good to the said Earle in such matters as he should declare unto them, for saying that he would make the *Parliament* the blackest *Parliament* that ever was in England, endeavouring to marry the Lady *Elizabeth* the Kings sister, taking a bribe of *Sberrington*, accused of Treason, and thereupon consulting with Counsell for him, and some other crimes, none of them Treason, so cleerly within the statute of 25. *E. 3.* or any other statute as is the case in question.

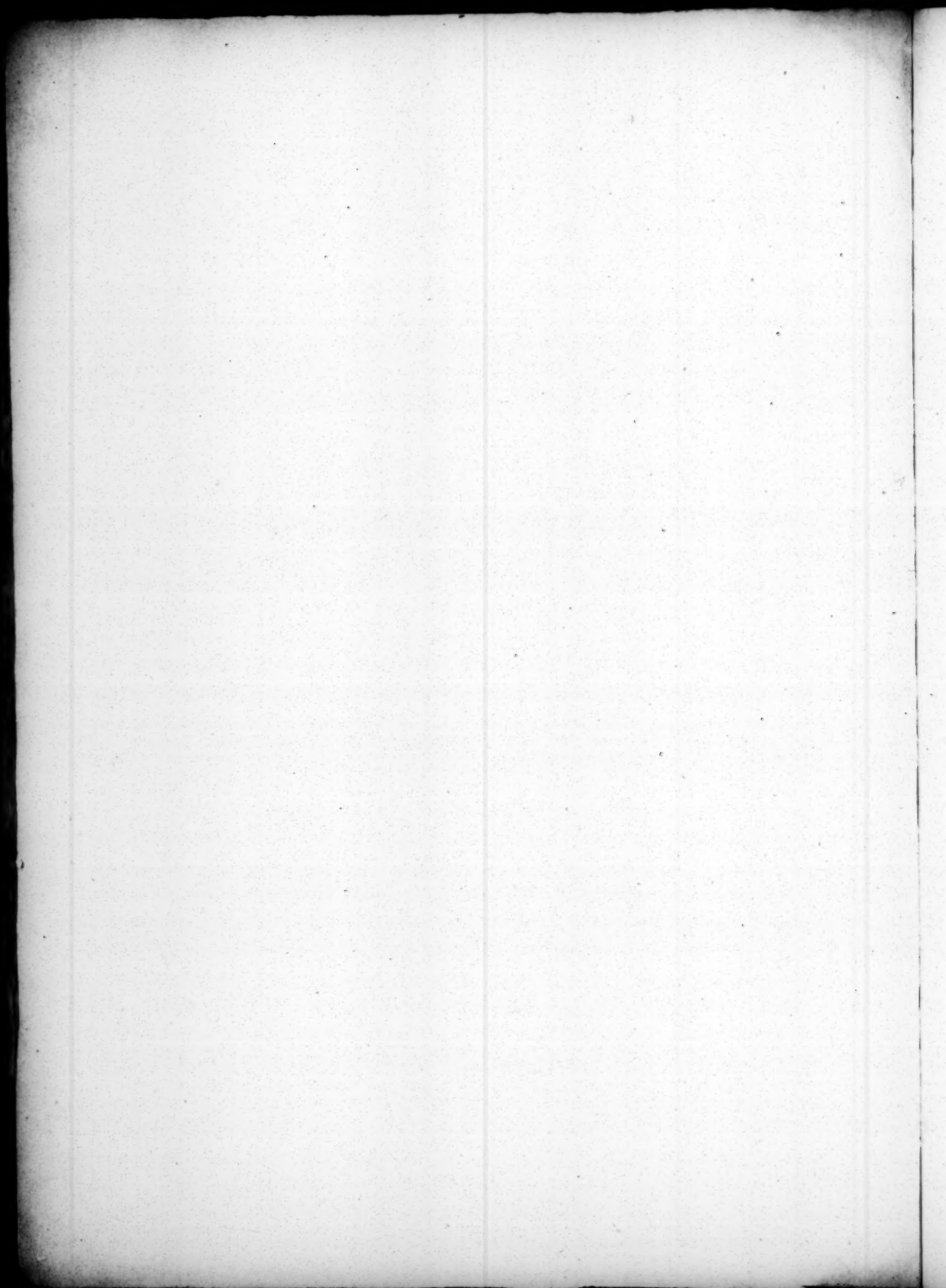
My Lords, All these Attainders, for ought I know, are in force at this day; the statutes of the 1. *H. 4.* and the 1. *Queene Mary*, although they were willing to make the statute of the 25. yeere of *E. 3.* the Rule of the inferiour Courts, yet they left the Attainders in *Parliament* precedent to themselves untoucht, wherein the *Legislative* power had been exercised. There's nothing in them whence it can be gathered, but that they intended to leave it as free for the future.

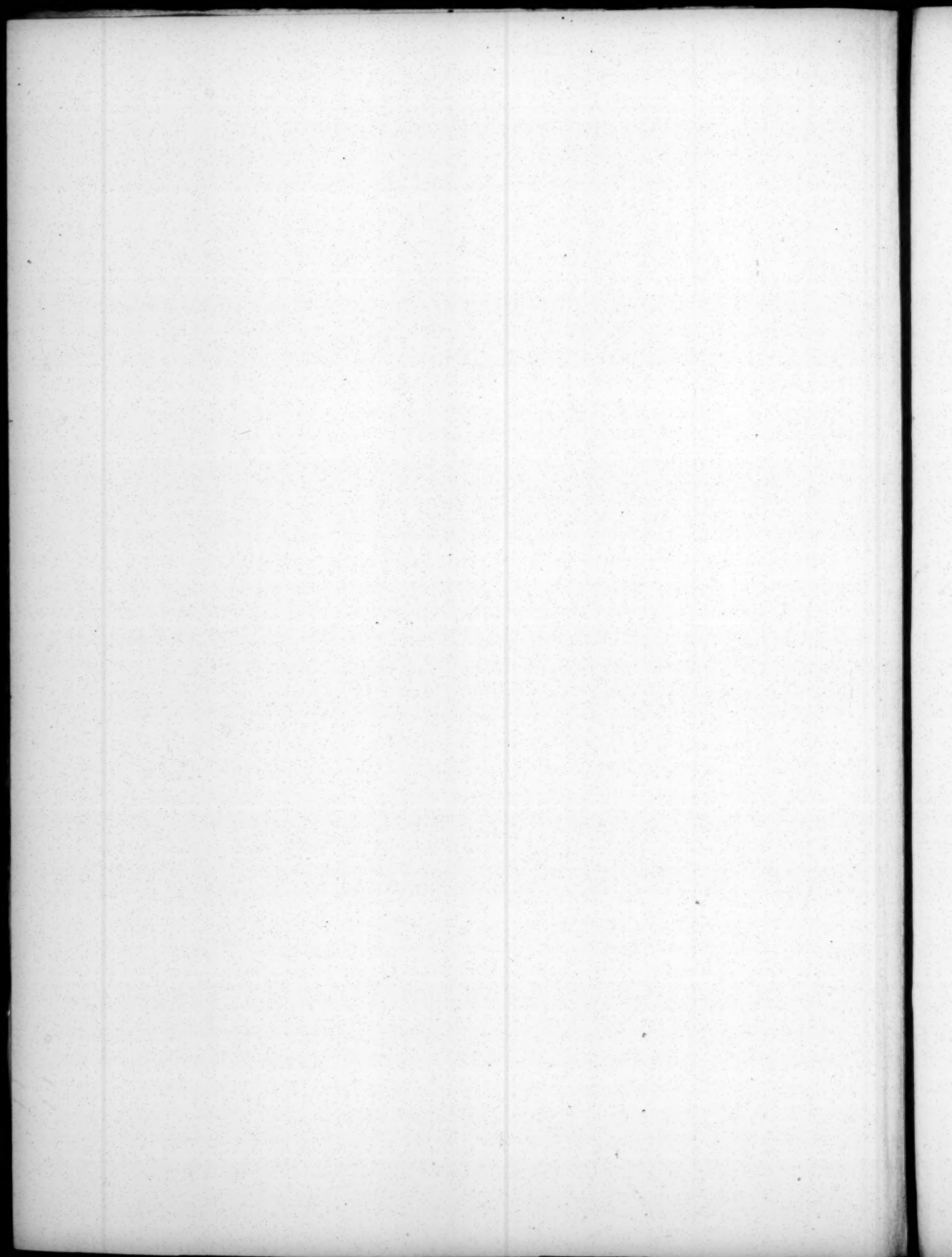
My Lords, in all these Attainders, there were crimes and offences against the Law, they thought it not unjust, circumstances considered, to heighten and adde to the degrees of punishment, and that upon the first offender.

My Lords, We receive, as just, the other Lawes and statutes made by these our Ancesters: They are the rules we go by in other cases, why should we differ from them in this alone?

These (my Lords) are in part those things which have satisfied the Commons in passing the Bill: but it is now left to the Judgement and Justice of your Lordships.

FINIS.





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